# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>June 24, 2008 |
| v<br><br>JAMES SMALL, JR.,<br><br>Defendant-Appellee. | No. 275998<br>Wayne Circuit Court<br>LC No. 06-010837-01 |

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant, | |
| v<br><br>DALPHINE McCURTIS,<br><br>Defendant-Appellee. | No. 275999<br>Wayne Circuit Court<br>LC No. 06-010837-02 |

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

In these consolidated cases, the prosecution appeals as of right the circuit court orders dismissing these cases based on the grant of defendants' motion to suppress evidence. We reverse and remand for further proceedings. This case is being decided without oral argument pursuant to MCR 7.214(E).

## I. Basic Facts and Proceedings

Officer Tyrone Gray asserted that he received an anonymous tip that marijuana trafficking was occurring at the upper unit of a two-family home in Detroit and the seller had been observed driving a white Chrysler with a specific license plate number. This vehicle was registered to defendant, Dalphine McCurtis. Gray claimed that, the same day, he conducted surveillance at the home for 30 minutes, and he noticed that the white Chrysler was parked in the driveway. Gray stated that, during this 30-minute interval, he saw four different individuals approach the home and knock on the front door. Each time, the same individual inside the home walked to the porch, looked to see who had knocked on the door, and walked to meet the visitor

at the common front door. Gray asserted that, each time, the individual collected paper currency from the visitor in exchange for a small item, and the visitor left the home. Gray claimed that he followed the last visitor and engaged in a narcotics-related conversation with him, and the individual showed Gray two small bags containing marijuana, indicating that they had been purchased from the home.

Gray prepared an affidavit summarizing these assertions, and a magistrate issued a search warrant. The police officers who executed the search warrant found defendant McCurtis and defendant James Small, Jr., at the home packaging cocaine. Both defendants attempted to flee, and McCurtis was apprehended in the house. Small jumped through a window and grabbed the barrel of an officer's weapon before he was apprehended. The officers confiscated the cocaine, related paraphernalia, and a revolver. Defendants were arrested, and both were charged with possession with intent to deliver 450 grams or more but less than 1,000 grams of cocaine, MCL 333.7401(2)(a)(ii). Small was also charged with the attempted taking of a firearm from the possession of a police officer, MCL 750.479b. McCurtis was also charged with possession of a firearm during the commission of a felony, MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d).

Defendants filed a motion to suppress and/or for an evidentiary hearing, seeking dismissal of the charges. The circuit court found that Gray's affidavit was deficient because neither informant discussed in the affidavit had provided sufficient information and the affidavit could not "be reasonably relied upon". The circuit court conducted an evidentiary hearing to determine whether the good faith exception to the exclusionary rule applied, and Gray testified. The circuit court found that Gray was not credible because of his demeanor, his failure to recall the specific time during which he conducted surveillance, his inability to explain how he and the unidentified buyer were able to communicate that they were talking about the same house, his argumentativeness, and the inconsistency of his answers. The circuit court granted the motion to suppress and thereafter dismissed all charges against both defendants.

## II. Motion To Suppress

The prosecution argues that the circuit court erred in granting defendants' motion to suppress because it failed to give proper deference to the magistrate who issued the search warrant and it erroneously conducted the evidentiary hearing. We agree.

### A. Standards of Review

A trial court's findings of fact at a suppression hearing are reviewed for clear error. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). A factual finding is clearly erroneous "if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). However, questions of law, including constitutional and statutory construction, relevant to a suppression motion are reviewed de novo, *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007), as is the trial court's ultimate decision regarding a motion to suppress, *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000).

We review a trial court's decision regarding whether to conduct an evidentiary hearing regarding the validity of a search warrant affidavit for an abuse of discretion. *People v Martin*,

271 Mich App 280, 297-298; 721 NW2d 815 (2006). We review for clear error the facts supporting the trial court's decision regarding this motion, and we review the application of the law de novo. *Id.*

B. Analysis

Probable cause to justify a search is required before a search warrant may be issued. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651(1). Generally, evidence obtained during an illegal search and seizure must be excluded. *People v Goldston*, 470 Mich 523, 528-532; 682 NW2d 479 (2004). If the search warrant is supported by an affidavit that asserts probable cause, "the affidavit must contain facts within the knowledge of the affiant and not mere conclusions or beliefs." *Martin, supra* at 298. Further, MCL 780.653 provides:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
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> (a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

This Court must give "great deference" to a magistrate's determination of probable cause. *Keller, supra* at 474, 476-477; *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992), citing *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). As a reviewing Court, we must determine "whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *Russo, supra* at 603. "[A] search warrant and the underlying affidavit are to be read in a common-sense and realistic manner." *Russo, supra* at 604; *Martin, supra* at 297-298. Giving deference to the magistrate's decision requires us to "insure that there is a substantial basis for the magistrate's conclusion that there is a "fair probability that contraband or evidence of a crime will be found in a particular place." *Russo, supra* at 604 (internal quotation marks and citation omitted); see also *Keller, supra* at 475. We focus on the facts and circumstances, as set forth in the affidavit, supporting the magistrate's determination of probable cause, *Martin, supra* at 298, and our review is limited to "those facts that were presented to the magistrate", *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995), overruled in part on other grounds *People v Wagner*, 460 Mich 118; 594 NW2d 487 (1999), and overruled in part on other grounds *People v Hawkins*, 468 Mich 488; 668 NW2d 602 (2003).

In his affidavit, Gray averred that he had received an anonymous tip that marijuana trafficking was occurring at a specific home and the seller was driving a vehicle registered to McCurtis. Gray asserted that he saw McCurtis's vehicle in the driveway, observed four suspected drug transactions, and spoke with one purchaser, who confirmed that he had purchased marijuana from the targeted home. Gray asserted facts within his knowledge and not mere conclusions or beliefs, as can be inferred from his statements. *Martin, supra* at 302. Gray, an

experienced police officer with more than four years of experience in the narcotics section, was entitled to a presumption of reliability, and his independent investigation verified the information contained in the anonymous tip. *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). The anonymous tipster spoke from personal knowledge, and his or her information regarding McCurtis's vehicle and drug transactions was verified by Gray's surveillance, demonstrating his or her credibility or reliability. MCL 780.653(b). The unnamed buyer spoke from personal knowledge that he had purchased marijuana, and his credibility or reliability was also confirmed by Gray's observations that he purchased something from the targeted home. Gray observed what he, based on his experience, believed to be narcotics transactions. Reading the affidavit in a commonsense and realistic manner, and affording the magistrate due deference, we are persuaded that there was a substantial basis for the magistrate's conclusion that there was a "fair probability" that contraband or evidence of a crime would be found in the targeted home. *Russo*, *supra* at 604 (internal quotation marks and citation omitted); see also *Keller*, *supra* at 475.

Defendants argued to the circuit court that Gray's affidavit did not confirm the reliability or credibility of the anonymous source and claimed that the anonymous source and unnamed buyer did not exist. As this Court has stated:

> In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause. [*Williams*, *supra*, 240 Mich App 319-320 (internal quotations, citations, and emphasis omitted)].

The prosecution asserts that the circuit court abused its discretion by conducting an evidentiary hearing because defendants did not make the requisite showing.

> There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. [*Franks v Delaware*, 438 US 154, 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978) (footnote omitted); see also *Martin*, *supra* at 311.]

Applying *Franks*, this Court has stated that a "defendant is entitled to a hearing to challenge the validity of a search warrant if he 'makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause. . . .'" *Martin, supra* at 311, quoting *Franks, supra* at 155-156.

Defendants alleged deliberate falsehood or reckless disregard for the truth when they asserted that the anonymous informant and the unnamed buyer did not exist. However, they failed to make a preliminary showing, or even provide an offer of proof, to support these assertions. Defendants did not present an affidavit or other reliable statement of witnesses, and they failed to explain the absence of this support. We conclude that defendants offered nothing more than "a mere desire to cross-examine" Gray, and the circuit court therefore abused its discretion in conducting a hearing to evaluate Gray's credibility. See *Franks, supra* at 171; *Martin, supra* at 311.

The circuit court failed to afford the magistrate due deference regarding whether there was probable cause to support the search. Because the circuit court's decision to suppress was based in part on its credibility determination of Gray, a determination it would have been unable to make without conducting the hearing, the circuit court also erred in this respect in deciding the motion to suppress. We therefore reverse and remand for further proceedings.

The prosecution also argues that the circuit court erred by failing to apply the good-faith exception to the exclusionary rule. Given our resolution of the above issues, we need not address this issue.

II. Attempted Taking of A Firearm from The Possession of A Police Officer

We also conclude that the circuit court erred in suppressing evidence with respect to the attempted taking of a firearm from the possession of a police officer charge against Small. This charge was based on Small's alleged conduct toward a police officer *after* the police began to execute the search warrant. This Court has held that "the exclusionary rule does not act to bar the introduction of evidence of independent crimes directed at police officers as a reaction to an illegal arrest or search." *People v Daniels*, 186 Mich App 77, 82; 463 NW2d 131 (1990). Therefore, even if the circuit court had properly granted defendants' motion to suppress with respect to the other charges, it erred in applying the exclusionary rule to this charge.

III. Judicial Bias

The prosecution contends that the circuit court judge has an apparent bias or hostility against the prosecution, as evidenced by the fact that she has been reversed in prosecutor's appeals at least 39 times over the course of a period from August 2000 to April 2007, and that this should be considered disqualifying. The prosecution does not include any mention of this argument in the "statement of the question" section of its brief on appeal as required by MCR 7.212(C)(5). Therefore, this issue is deemed waived and not subject to appellate review. MCR 7.212(C)(5); *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

Further, the prosecution never filed a motion for disqualification. MCR 2.003(C) provides:

> (1) *Time for Filing*. To avoid delaying trial and inconveniencing the witnesses, a motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness, including delay in waiving jury trial, is a factor in deciding whether the motion should be granted.
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> (2) *All Grounds to Be Included; Affidavit*. In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

The procedure provided in MCR 2.003 "is exclusive and must be followed." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 23; 436 NW2d 70 (1989). Given the prosecution's failure to move the circuit court for disqualification in this case and this class of cases, it appears that it was content to allow the circuit court judge to hear defendants' motion, and this failure constitutes a tacit approval for the circuit court judge to preside. *Reno v Gale*, 165 Mich App 86, 90-91; 418 NW2d 434 (1987).

However, this Court may remand a case to a different judge "if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication." *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004); *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997). Given the circuit court judge's previously expressed views regarding Gray and her extensive previous rulings against the prosecution, it would be reasonable to expect her to have substantial difficulty in putting these views and rulings aside. Reassignment is therefore advisable to preserve the appearance of justice, and given that no trial has begun, reassignment will not entail excessive waste or duplication. We remand for further proceedings before a different judge.

We reverse the circuit court's orders and remand to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette